IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 944, 945

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner,*

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, *Respondent.*

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner,*

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendant and Third Party Plaintiff, *Respondents,*

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, Third Party Defendant, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The opinion of the Circuit Court of Appeals is not officially reported, but is set forth verbatim in the Summary Statement of the Matter Involved in the foregoing petition. (Tr. 583-

The Jurisdiction of this Court, as already stated, is found in USCA Title 28, Section 347 (a).

THE CONTRACT ENTERED INTO BY MATHEWS (DECEASED) AND LUM UNDER DATE OF FEBRUARY 2, 1934, CONSTITUTED A PLEDGE.

Probably in the view which the District Judge took of the controversy and because of the manner in which he disposed of the issues, there was no great materiality attaching to his characterization of the contract. For the same reason, perhaps, the Circuit Court of Appeals never addressed itself to this particular question. However, anticipating the time when the dealings between the parties may become the subject of an accounting, correct characterization of the contract becomes of some importance.

This contract was prepared by the attorneys for Mathews (deceased), who conducted the negotiations on his behalf with Lum. Lum was not represented by counsel, or, as Lum put it, "not unless it was Albrecht, Maguire and Mills." (Pr. Tr. 534a)

The District Court construed the contract as "a valid contract of sale." (Pr. Tr. 552.) It is the contention of petitioner that it was no more than a pledge.

It is true that the contract uses the verb "buy" and the verb "sell" as descriptive of the participation therein by Mathews (deceased) and Lum, respectively. (Pr. Tr. 9a) But there is much more to the contract that that mere statement of such participation.

There was, for instance, the right in Lum to re-possess the pledged assets at any time within fifteen years, provided that the financial consideration to support the option so to do was currently paid by Lum. Although Mathews, deceased, had the right to sell the pledged assets, he could do so only after notice to Lum of any proposed sale, and subject to the right on Lum's part to substitute himself as purchaser at the price and terms agreed upon for the proposed sale. In the event that any of the assets were sold by Mathews (deceased), the proceeds of the same were to be applied to Lum's indebtedness under the contract. Finally, at any time when Mathews (deceased) received from any

disposition of the pledged assets the amount of the loan and four percent interest thereon, Lum *ipso facto* regained possession of any unsold collateral remaining.

These various provisions, we submit, definitely stamp the contract as a pledge and not as a purchase and sale, and this seems to be the law of such decisions as *Home Bond Company* v. *McChesney*, 239 U. S. 568; *General Motors Acceptance Corp* v. *Mid-West Cheverolet Co.*, 66 F. (2d) 1; *Mount Tivy Winery* v. *Lewis*, 134 F. (2d) 120; *Ketter* v. *American Bankers Finance Co.*, 306 Pa. 483. The record definitely shows that Lum had put up his assets "as collateral. No question about that." (Pr. Tr. 511a)

THE PAYMENTS REQUIRED BY THE CONTRACT, TO KEEP HIS OPTION TO REPOSSESS ALIVE, WERE MADE BY LUM IN STRICT ACCORDANCE WITH THE CONTRACT AS RESPECTS BOTH AMOUNT AND TIME.

The same attorneys and agents for Mathews (deceased) who represented him throughout the negotiations with Lum, and who prepared the contract, continued to represent Mathews (deceased) and maintained the account between Mathews (deceased) and Lum.

The evidence of Lum's payments and credits on the option account comes from that statement maintained by Albrecht, Maguire & Mills, attorneys for Mathews (deceased). The evidence that Lum was paid up on the option account to January 1, 1939 was the admission by the same member of that law firm who prepared the contract. The evidence of Lum's detailed payments, and the fact that his final credit was $2219.47 as of the day of his supposed forfeiture of his option right, came from the same account.

The declaration and notice of default was made by the same law firm, and by the particular member thereof who acted as agent for Mathews (deceased) in all of the latter's negotiations with Lum. And as an incident, it may be noted that as Lum was paid up to January 1, 1939, and a new

month began under the contract on January 2, 1939, at any time during which month Lum could have made his payment, if due, the declaration and notice of default on January 12, 1939 was premature.

None of this evidence is controverted in this record.

It is not for this petitioner to explain, and, indeed, he cannot explain how the District Judge reached his diverse Findings of Fact on this particular subject. Nor can this petitioner explain how the District Judge, after he had correctly found that Lum was actually overpaid $2219.47 on the final day of the supposed default, could then, as a Conclusion of Law, find that Lum had defaulted on his contract, and forfeited his option rights.

Nor is it for this petitioner to explain, nor can he explain, how, in the face of this state of the record, the Circuit Court of Appeals disposed of this controversy in the belief that all of the questions were questions of fact, that the facts were in controversy, but that the District Judge resolved them in well defined conclusions.

Petitioner respectfully submits that his every aim to recover assets of the bankrupt Lum, for the benefit of his creditors has been thwarted by the errors of the Courts below. Unless the action of this Court is such as will permit the Trustee to go forward in that endeavor, all creditors of Lum, other than the Mathews Estate, are foreclosed.

Petitioner therefore respectfully submits this is a case which calls for the exercise by this court of its power of supervision over the courts below sufficiently to remand the case for such action as will enable petitioner to secure an accounting.

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a bankrupt, *Petitioner.*

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March 12, 1946.